Nos. 79-67 and 79-148

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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WILLIAM WALTER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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ARTHUR RANDALL SANDERS, JR., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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INDEX

Argument—Continued





Argument—Continued



## CITATIONS

Cases:

Cases—Continued Page





Cases—Continued Page

Cases—Continued





Cases—Continued

Cases—Continued



Constitution:



Statutes, and rules:





Miscellaneous:

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### OPINIONS BELOW

The opinion of the court of appeals affirming the convictions (Pet. App. 1-36)[1] is reported at 592 F.2d 788. The opinion of the court of appeals denying a

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[1] "Pet. App." refers to the appendix to the petition in No. 79-67.

petition for rehearing (Pet. App. 37-39) is reported at 597 F.2d 63.

## JURISDICTION

The judgment of the court of appeals was entered on April 2, 1979. A petition for rehearing was denied on June 15, 1979. The petitions for a writ of certiorari were filed on July 16, 1979, and were granted on October 15, 1979. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the exclusionary rule should be applied to suppress five obscene films consensually transferred to the government by a third party to whom the films had been inadvertently misdelivered.

2. Whether petitioners' convictions should be reversed because of alleged errors by the trial court.

## STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners Walter, Sanders and Gulf Coast News Agency, Inc., were convicted on five counts of transporting obscene films in interstate commerce, in violation of 18 U.S.C. 1465, and on five counts of using a common carrier to transport obscene films in interstate commerce, in violation of 18 U.S.C. 1462. Each petitioner was also convicted of conspiracy to commit the substantive offenses, in violation of 18 U.S.C. 371.[2] Petitioners Walter and Sanders were sentenced to concurrent terms of three years' imprisonment on all counts. Petitioner Trans World America, Inc. was fined $10,000, and petitioner Gulf Coast News Agency, Inc. was fined $3,000 on each count for a total fine of $33,000.

1. The evidence adduced at trial and at a pretrial suppression hearing showed that petitioners Walter and Sanders were business partners who owned a network of adult cinemas, bookstores and distribution warehouses, including co-petitioners Gulf Coast News Agency, Inc., a warehouse enterprise in St. Petersburg, Florida, and Trans World America, Inc. (TWA), a like business in Atlanta, Georgia (VI Tr. 43-75, 86-101, 108, 112-113, 153-155, 168-177; VII Tr. 35-39, 184-187, 203, 210-211).[3] Walter and Sanders had offices in both warehouses although they principally worked out of the TWA warehouse (VI Tr. 74-75; VII Tr. 109). Gulf Coast News, which was managed by co-defendant Richard Larson, distributed sex-oriented books and films as well as sexual

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[2] Co-defendant Michael Grassi was tried separately and was convicted on all counts. His convictions were affirmed on appeal. *United States* v. *Grassi*, 602 F.2d 1192 (5th Cir. 1979), petition for cert. pending, No. 79-809. Co-defendant Richard Larson, who was a fugitive at the time of petitioners' trial, has been apprehended and is awaiting trial.

[3] "Tr." preceded by volume number designates the reporter's transcript. Volume IV of the transcript is subdivided into three separately paginated portions, each of which records testimony at the suppression hearing. The first portion will be referred to as "IV Tr." The next two portions contain the testimony of petitioner Sanders and co-defendant Michael Grassi and will be referred to as "IV-S Tr." and "IV-G Tr." respectively.

paraphernalia to a number of adult bookstores in or near St. Petersburg, Florida. It received most of its materials from TWA (VI Tr. 179-196).

In September 1975, Larson telephoned petitioner Sanders in Atlanta to report that he had been unable to sell a large quantity of homosexual films from a series entitled "David's Boys" (XII Tr. 236, 247; IV-S Tr. 3, 4, 28, 34).[4] Sanders directed Larson to ship the films back to TWA in Atlanta via Greyhound Package Express (VII Tr. 18-19). Following Sanders' directions, Larson instructed Ronald Bowman, a shipping and receiving clerk at Gulf Coast News to prepare the "David's Boys" films for shipment. Larson told Bowman to send the materials under the name "D and L Distributors" at a nonexistent address, in lieu of Gulf Coast News, and to employ "Leggs Incorporated"[5] as the name of the intended recipient, in lieu of TWA (XII Tr. 167). In order to avoid detection by the authorities in the event the contents of its packages were discovered, Gulf Coast News consistently used fictitious shipping

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[4] Ron Akins, who operated one of petitioners' Florida adult bookstores, testified that he sold only one reel of film from the "David's Boys" series (VII Tr. 194). Walter and Sanders admitted at the suppression hearing that they had originally purchased the films for Gulf Coast News but the films were not selling and had to be returned (IV Tr. 226, 236, 247; IV-S Tr. 2-3).

[5] "Leggs" was the nickname of a female employee at TWA (VII Tr. 25; IV 37).



information when shipping sexually explicit materials[6] (VIII Tr. 23-24, 107).

On September 25, 1975, using these fictitious names, Bowman shipped 12 packages containing 871 individual cartons of film to Atlanta from St. Petersburg via Greyhound.[7] The packages were labeled "printed material" and were shipped collect or "will call." This latter designation meant that the intended recipient would pick up and pay for the films at the Greyhound terminal in Atlanta (VII Tr. 23-29, 174).

Upon arrival of the shipment in Atlanta, a Greyhound employee noticed that the named recipient was "Leggs Incorporated." Believing that the name referred to L'Eggs Products, Inc., a manufacturer of women's hosiery and one of Greyhound's regular customers, he forwarded the shipment to a Greyhound substation located in the suburbs of Atlanta where L'Eggs regularly received deliveries. The twelve packages arrived at the substation on September 26, 1975, and a Greyhound employee routinely requested L'Eggs to pick up the shipment. Later that same day, Michael Horton, an area manager at L'Eggs, went to the substation; because the packages looked unusual he decided to open one. His inspection disclosed that the package contained numerous individual cartons

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[6] When Gulf Coast News shipped materials such as projector parts fictitious names were not used (VII Tr. 23-24). At the suppression hearing, Walter and Sanders testified that fictitious names were used to prevent pilferage (XII Tr. 228-229).

[7] There were only 25 different film titles in the shipment; most of the films were duplicates (VI Tr. 158).

of explicit homosexual films. One side of each carton showed two nude males kissing and embracing; the other side contained explicit language describing the conduct portrayed on the film.[8]

Instead of accepting delivery of the packages, Horton returned to his office and reported his findings to his supervisors at L'Eggs Products (XII Tr. 57-62). After being assured by Horton that the shipment was addressed to the hosiery company, William Fox, the L'Eggs branch manager returned to the Greyhound substation, picked up the twelve boxes and brought them back to his office. He was concerned that someone was using the company's name to transport pornographic films and he did not want the company to be implicated in such an operation (IV Tr. 104, 107; XII Tr. 121, 126-127, 129).[9] Upon Fox's return to the company's offices with the shipment, Fox, Horton and one or two other L'Eggs employees opened each of the 12 boxes and found that each contained individual cartons of eight millimeter homosexual oriented films. They read the descriptions on several of

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[8] These descriptions have been reproduced in the court of appeals' opinion (Pet. App. 10-11 n.5).

[9] Fox testified that he thought Horton might be joking about the contents of the shipment, and wanted to investigate himself. The employees at L'Eggs also considered the possibility that a disgruntled former employee had ordered the films. No one expressed any concern over the fact that the "Leggs Incorporated" address lacked an apostrophe and the word "Products." Indeed, both Horton and Griffin Askew of Greyhound were uncertain of how the hosiery company spelled "L'Eggs" (XII Tr. 32, 74).



the cartons and one employee attempted to view one of the films by holding it to the light; his effort proved unsuccessful because the film was too small for him to discern what each frame depicted (IV Tr. 104; XII Tr. 199).

That same day, Horton telephoned FBI Special Agent Lawrence Mandyck and requested the agent to remove the films (XII Tr. 66-67, 121, 171, 199). Agent Mandyck agreed to take the films and instructed Horton to put the boxes in a safe place. Five days later, on October 1, 1975, Agent Mandyck came to the L'Eggs office, was shown the twelve open boxes as well as several of the individual film cartons and, at the company's request, removed the films and transported them to the FBI office (IV Tr. 107; XII Tr. 121, 170-172). The agent inventoried the contents of all 12 boxes and found that they contained 871 films with 25 different titles. He kept one copy of each of the 25 different films and resealed the remainder of the packages for storage at the United States Marshal's office (XII Tr. 174-175). At this point, neither Agent Mandyck nor the employees of L'Eggs knew the identity of the actual shipper or the actual intended recipient of the films; nor did they have any knowledge that anyone was looking for the films. Gregory Shults, a L'Eggs employee, was unsuccessful in his efforts to locate a telephone directory listing for another company named "Leggs Incorporated" in Atlanta, or for a "D and L Distributors" in Florida (XII Tr. 151).

In the meantime, TWA had attempted to pick up the shipment of films from Greyhound in Atlanta on September 26, 1975, but had been told by Greyhound that the packages had not arrived (VII Tr. 29). During the following week, Bowman (who had shipped the packages) went to the St. Petersburg Greyhound terminal to check on the shipment and co-defendant Larson asked Greyhound to trace the packages (VII Tr. 30-31; XII Tr. 13). During this same time period, a woman called the Atlanta Greyhound terminal to inquire whether the packages had arrived; however, she refused to leave her name (XII Tr. 36). After learning from L'Eggs that the films had been turned over to the FBI, Griffin Askew of Greyhound called the FBI to report the woman's phone call. Agent Mandyck requested Askew to try to get her name, address and phone number if she called again. She called twice more, and on the third call agreed to give her name only (XII Tr. 36, 51-52, 207-209). These calls were also reported to the FBI.

Two or three weeks after the shipment had been turned over to the FBI, Michael Grassi, a TWA employee, inquired at the hosiery company, asking if it had obtained the shipment.[10] A L'Eggs representative told Grassi that the company had received the shipment, but had given the films to the FBI. Grassi informed Walter, Sanders and Larson that the films were in the possession of the FBI (IV-G Tr. 9, 19-

[10] He explained that it seemed like a natural place to look (IV-G Tr. 24).



20; IV-S Tr. 5-6). Sanders thereupon instructed Larson to destroy any bills of lading traceable to "Leggs" and, after discussing it with Walter, turned the matter over to his attorney (IV-S Tr. 8, 47-48). One or two days after Grassi's inquiry, L'Eggs reported to the FBI that a Michael Grassi was looking for the films (XII Tr. 125). Neither petitioners nor any of their employees ever contacted the FBI about the films.

A month after the FBI had obtained the films, Mandyck and another agent viewed them with a projector (XI Tr. 175, 195). In February 1976, Mandyck filed an investigative report with the United States Attorney's Office. Petitioners were indicted on April 6, 1977, on charges relating to five films in the shipment. The first time petitioners sought to have their films returned was on June 3, 1977—more than 20 months after the shipment—when they filed a motion for the return of the films and for their suppression from evidence.[11] Petitioners did not request a prompt adversary hearing, but agreed to wait until the eve of trial to have their motion heard. See III Tr. *passim*.

2. After a hearing, on August 9, 1977, the district court denied the motion to suppress, finding that in opening, examining and transferring the material to the FBI, the L'Eggs employees had acted on their own and not at the instigation of the government (A. 33), and that contrary to petitioners' claim there was

[11] TWA and Gulf Coast News did not join in this motion.

no credible evidence that the government ever instructed either Greyhound or L'Eggs to conceal the whereabouts of the film (A. 34). The court concluded that suppression was not warranted under the circumstances, reasoning that petitioners had relinquished any reasonable expectation of privacy in the materials (A. 37-41, 44),[12] and, alternatively, that this case involved a private search and no government seizure within the meaning of the Fourth Amendment (A. 41-44). Noting that retention of the films by the government did not constitute a prior restraint (since there was no threat of destruction of the films and no showing that the retention of the films precluded exhibition of other copies), the court reserved decision on the motion to return the films to await the outcome of the trial which was to commence the next day (A. 22-25, 44-45). As already noted, all petitioners were convicted on all counts and duly sentenced.

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[12] The district court stated (A. 37-38):

> And it seems to me, under the circumstances of this case, that shipping or causing or suffering to be shipped by a common carrier, namely, Greyhound Bus Lines, with a fictitious name given for the shipper as well as the fictitious name given for the consignee or addressee, amounts to a relinquishment or abandonment of any reasonable expectation of privacy.
>
> Or, stated another way, it seems to me that it was reasonably foreseeable in those circumstances that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be mis-delivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded.



3. The court of appeals affirmed, with one judge dissenting (Pet. App. 1-36). The majority refused to consider the Fourth Amendment claim of either TWA or Gulf Coast News since neither had made a pretrial motion to suppress the films (Pet. App. 5). As to the individual petitioners, it held that the acquisition of the shipment and the search of the twelve boxes by L'Eggs was a "private search," outside the protection of the Fourth Amendment (*id.* at 6-7). The court further held that the government did not "seize" the films when it accepted the shipment from L'Eggs, and that it did not conduct an additional search when it thereafter viewed the films (*id.* at 7-12). Accordingly, on the facts of this case, the court concluded that the government was not required under the Fourth Amendment to obtain a search warrant for the films. The majority also held that there was sufficient evidence at trial to prove petitioner Walter's scienter and that the district court's instruction on the average person in the community was not error because it "* * * adequately directed jury consideration to the contemporary [community] standards of adults * * *" (*id.* at 13-17).

Judge Wisdom dissented. He concluded that the FBI's retention of the films for two years without a judicial determination of obscenity constituted a prior restraint (Pet. App. 18-24). In addition, he found that petitioners retained a possessory interest and a legitimate expectation of privacy in the films, and concluded that petitioners' Fourth Amendment rights

were violated by the warrantless acquisition and viewing of the films by the FBI (*id.* at 24-36).

In a per curiam opinion denying rehearing, the majority of the panel observed that even if the government's retention of the films had constituted a "prior restraint," the proper remedy was the return of the property to its owner, not its suppression from evidence at a criminal trial (Pet. App. 38-39).

## SUMMARY OF ARGUMENT

The issues presented in this case are readily divisible into two parts. The first concerns whether petitioners were entitled to exclusion of the films from evidence because of alleged violations of petitioners' rights under the Fourth and First Amendments. The second involves alleged errors by the district court in the conduct of the trial. As we demonstrate below, neither set of contentions affects the legality of petitioners' convictions.

### I.

A. The Fourth Amendment protects people from unreasonable governmental intrusion only in situations where there is a legitimate expectation of privacy. When petitioners shipped the films by common carrier to a recipient with a fictitious name, they assumed the risk that the films would come into the possession of an unknown private party who would open the boxes, discover the nature of the films, and turn them over to law enforcement authorities. Thus, petitioners, by their own actions, relinquished any legitimate expectation that the films would remain private. Nor may petitioners claim any



additional expectation of privacy by virtue of the fact that the films were "arguably protected" by the First Amendment. Whatever privacy rights petitioners may have had under the First Amendment if they had chosen to possess the films at home, they relinquished any special privacy claim by transporting the films in interstate commerce by common carrier.

B. Even if petitioners retained a legitimate expectation of privacy with respect to the packages containing the films, they are not entitled to suppression because the films did not come into the government's possession by means of an unconstitutional search or seizure. As this Court held in *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), the Fourth Amendment applies only to searches and seizures involving government action. The ruling in *Burdeau* is consistent with the primary purpose of the exclusionary rule—to deter constitutional violations by law enforcement officials. In taking possession of the packages and opening them to inspect their contents, the employees of L'Eggs were acting purely in a private capacity and not at the instigation, or with the participation, of the government. Moreover, although the government ordinarily must obtain a warrant prior to seizing material "arguably protected" by the First Amendment, there was no "seizure" when the FBI accepted the shipment of films that was voluntarily relinquished by L'Eggs. The warrant requirement is simply inapplicable in the case of a consensual transfer such as occurred here. Finally, the FBI was not required to obtain a warrant before screening the

films. The boxes containing the films had been opened by L'Eggs personnel before the films were transferred to the FBI. Because the exterior of the individual film cartons explicitly described the sexual activity depicted in each film, petitioners had no remaining legitimate privacy interest in the films, and thus the viewing of the films did not violate petitioners' Fourth Amendment rights.

C. The government's failure prior to indictment to arrange for an adversary hearing on the issue of obscenity vel non does not require suppression of the films from evidence. The films were in the process of being returned for storage and were not seized by the government for the purpose of destruction or censorship. Under these circumstances, the retention of the films by the government did not even arguably restrict petitioners' right to distribute the films. In addition, petitioners made no request for return of the films or for an adversary hearing until almost 20 months after they received actual notice that the films were in the government's possession. Since petitioners are thus themselves primarily responsible for any delay in obtaining an adversary proceeding, they cannot claim an infringement of their First Amendment rights. Moreover, even if their First Amendments rights were violated, petitioners were entitled to no more than the return of the films, not their suppression at trial.

II.

A. Petitioners' challenges to the jury instructions are without merit. The trial court instructed the jury to consider whether the material was obscene "in light



of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in sex." This instruction properly directed the jury to apply an adult standard in judging the material, and was consistent with this Court's holding in *Pinkus* v. *United States*, 436 U.S. 293 (1978). The trial court correctly refused to comply with petitioner Walter's request for an instruction that certain terms in the definition of obscenity are impossible to calculate. Petitioner Walter's attack upon the obscenity definition raises not a question of fact for the jury, but one of law that the courts have consistently rejected. In addition, the court properly instructed the jury to consider the prurient appeal of the films either to the average person in the community or to members of a deviant sexual group. The jury was told that the burden was on the government to show that the films were intended for homosexuals before their appeal to that deviant group could be considered.

B. The evidence was sufficient to show that petitioner Walter was aware of the pornographic nature of the material he purveyed. Despite the fact that Walter owned and operated an extensive network of "adult" movie theaters, bookstores and warehouses, he attempted to conceal his interest in the business. On several occasions, petitioners' employees were arrested for selling obscene goods. This is not a case in which a legitimate bookseller inadvertently stocks an obscene book. The evidence thus established Walter's scienter to commit the offenses of which he was convicted.

C. The district court did not abuse its discretion in its handling of Walter's complaints that one of the jurors was not paying adequate attention to the films. The trial court's finding that the juror was sufficiently attentive was accepted by the court of appeals and should not be disturbed by this Court.

D. The trial court properly exercised its discretion in conducting the jury voir dire. Although the court did not specifically question each prospective juror concerning his length of residence in the community, the court did ask most of the jurors either about their period of residence in the community, or their length of service at their present place of employment. Furthermore, the members of the jury pool were required to have resided in the community for at least one year, a sufficient period for them to become familiar with local standards.

E. The district court properly denied petitioner Walter's motion for a severance of his trial from that of petitioner Sanders. The evidence against both Walter and Sanders was essentially the same. Moreover, the court adequately questioned the jury on voir dire concerning pretrial publicity directed at Sanders. In addition, the testimony of Sanders' girlfriend regarding conversations between Walter and Sanders was admissible against both defendants. Finally, Walter made no credible showing that co-defendant Michael Grassi would have testified in his behalf at a separate trial, and it is unlikely that Grassi's testimony would have been helpful to Walter's case in any event.



## ARGUMENT

### I. THE INTRODUCTION INTO EVIDENCE OF THE FIVE ALLEGEDLY OBSCENE FILMS DID NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FOURTH OR FIRST AMENDMENTS

#### A. There Was No Fourth Amendment Violation Since Petitioners Had No Legitimate Expectation Of Privacy With Respect To The Films

This Court has "recognized special constraints upon searches and seizures of material arguably protected by the First Amendment * * *." *Lo-Ji Sales, Inc.* v. *New York*, No. 78-511 (June 11, 1979), slip op. 6 n.5. Where expressive materials sought to be seized may be subject to First Amendment protection, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965). See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978). Invoking this principle, petitioners primarily argue (Walter Br. 22-34; Sanders Br. 13-17) that the manner in which the government acquired and inspected the films in this case did not meet the strict requirements of the Fourth Amendment. We submit at the outset, however, that the Fourth Amendment is simply inapplicable here because petitioners had no legitimate expectation of privacy in the films.

"The Fourth Amendment protects people, not places." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Whenever an individual has a legitimate expectation of privacy, he is entitled to be free from unreasonable governmental intrusion. See *Rakas* v.

*Illinois*, 439 U.S. 128, 143 (1978); *id.* at 150-153 (Powell, J., concurring); *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977); *United States* v. *Miller*, 425 U.S. 435, 440 (1976); *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968). It follows that one is sometimes entitled to claim the protection of the Fourth Amendment without having a property right in the invaded area. But, on the other hand, "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12. See also *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967).[13] Moreover, a "legitimate" expectation of privacy does not arise from an individual's subjective expectation of not being discovered; rather, the expectation must be "one that society is prepared to recognize as 'reasonable.'" *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12, quoting from *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J., concurring).

Thus, the Fourth Amendment does not protect persons engaged in crime from the risk that those with whom they associate or converse will cooperate with

[13] While the Court has not completely abandoned the use of property concepts in determining the presence or absence of privacy interests protected by the Fourth Amendment, it has made quite clear that "arcane distinctions" of property law are not controlling in deciding Fourth Amendment questions. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143, 144 n.12, 149-150 n.17.



the government. See *United States* v. *Caceres*, 440 U.S. 741, 750-751 (1979); *United States* v. *White*, 401 U.S. 745, 751-752 (1971) (plurality opinion); *Alderman* v. *United States*, 394 U.S. 165, 179 n.11 (1969); *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966); *Lewis* v. *United States*, 385 U.S. 206, 211 (1966); *id.* at 213 (Brennan, J., concurring). Similarly, where two people have joint access to, or control of property, it is reasonable to recognize that each person may permit inspection in his own right, and that each has assumed the risk that the other might permit a search of the common property. See *United States* v. *Matlock*, 415 U.S. 164, 170-171 & n.7 (1974); *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). By the same token, it follows that one who abandons incriminating property has no justifiable expectation that such property will not be examined by others, including government agents. See *Abel* v. *United States*, 362 U.S. 217, 240-241 (1960); *Hester* v. *United States*, 265 U.S. 57, 58 (1924); *United States* v. *Miller*, 589 F.2d 1117, 1133-1134 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979); *United States* v. *Pruitt*, 464 F.2d 494, 495-496 (9th Cir. 1972).

Applying these principles to the facts of this case, we submit that petitioners had no legitimate expectation of privacy with respect to either the packages or the films that they shipped by common carrier[14] un-

[14] Because the tariffs of most common carriers include a right of inspection, resorting to common carriers in itself reflects a diminished expectation of privacy in the contents of the shipment. See *United States* v. *Orito*, 413 U.S. 139, 142 n.5 (1973).

der fictitious names. In doing so, they assumed the risk that the packages would be mistakenly delivered to an innocent third party, who would ascertain their contents and turn the packages over to law enforcement authorities. Moreover, by placing each reel of film inside a carton whose exterior contained an explicit description of the sexual activity portrayed in the film, petitioners unquestionably abandoned any expectation of privacy with regard to the nature of the material (see pages 39-41, *infra*). Thus, while petitioners may have retained an abstract proprietary interest in the packages of film, by their own actions they relinquished any legitimate expectation that the films would remain hidden from scrutiny by others.

It is not enough that petitioners may have had subjective expectations that their criminal scheme would not be discovered (Walter Br. 24-25); any such expectations were not of the sort that society is prepared to recognize as "reasonable." It is therefore immaterial that the packages were secured to prevent breakage during shipment, or that previous shipments under fictitious names had not been misdelivered. Nor does the explanation that fictitious names were used to prevent pilferage, even if true, have any bearing on the legitimacy of petitioners' expectations of privacy with regard to the films, since it was not reasonable to expect that the contents of the packages would remain private once misdelivery occurred.

Finally, the fact that the packages contained material that was "arguably protected" by the First



Amendment does not affect the determination whether petitioners had a legitimate expectation of privacy under the Fourth Amendment with respect to the packages and their contents. The right under the First Amendment to possess obscene material in the privacy of one's home (see *Stanley* v. *Georgia*, 394 U.S. 557 (1969)) does not give rise to a correlative right to privacy in transporting such material in interstate commerce. *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 128 (1973). This Court has rejected the notion "that some zone of constitutionally protected privacy follows [obscene] material when it is moved outside the home area * * *." *United States* v. *Orito*, 413 U.S. 139, 141-142 (1973). Thus, whatever privacy rights petitioners may have had by virtue of the First Amendment if they had chosen to possess the material at home, they surrendered any special privacy claim by transporting the obscene films in interstate commerce by common carrier. See *id.* at 142.

If the Court agrees with this submission, petitioners' Fourth Amendment contentions are at an end. But even if petitioners may be said to have retained some "legitimate" expectation that the contents of the packages would remain undisclosed, the record shows that there was no unreasonable search or seizure within the meaning of the Fourth Amendment.

**B. The Fourth Amendment Was Not Violated Because There Was No Unreasonable Search Or Seizure In This Case**

***1. The Fourth Amendment does not apply to private searches and seizures***

At least since *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921),[15] the governing principle has been that the protections of the Fourth Amendment attach only to searches and seizures involving "governmental action;" or, stated otherwise, the protections of the Amendment do not reach "the act of individuals in taking the property of another." *Ibid.* In *Burdeau*, private detectives entered McDowell's private office, where they blew open two safes, forcibly opened his desk and removed McDowell's private papers, which they turned over to the government. McDowell sought the return of his papers, which he alleged were about to be presented to a grand jury investigating mail fraud violations. The district court concluded that even though the government had not acted unlawfully, McDowell's papers had been illegally and wrongfully taken from him in violation of the Fourth Amendment, and "the Government should not use stolen

[15] Earlier, in *Weeks* v. *United States*, 232 U.S. 383, 398 (1914), this Court held that only the actions of federal, not state, officials were subject to the terms of the Fourth Amendment. That, of course, is no longer the law. See *Elkins* v. *United States*, 364 U.S. 206 (1960); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). But neither *Elkins* nor *Mapp* casts doubt upon the continued vitality of the *Burdeau* rule. See 1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* 111-112 (1978).



property for any purpose after demand made for its return." *Id.* at 472.

This Court reversed (256 U.S. at 475):

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

Since government agents had nothing to do with the wrongful seizure of McDowell's property, the Court concluded that "there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure." *Ibid.*[16] See also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487 (1971).[17]

[16] The Court assumed that McDowell had "an unquestionable right of redress against those who illegally and wrongfully took his property." 256 U.S. at 475.

[17] Accord, *e.g.*, *United States* v. *Goldstein*, 532 F.2d 1305, 1311 (9th Cir.), cert. denied, 429 U.S. 960 (1976); *United States* v. *Harvey*, 540 F.2d 1345 (8th Cir. 1976); *United States* v. *Harless*, 464 F.2d 953 (9th Cir. 1972); *Wolf Low* v. *United States*, 391 F.2d 61 (9th Cir.), cert. denied, 393 U.S. 849 (1968); *Barnes* v. *United States*, 373 F.2d 517 (5th Cir. 1967).

The *Burdeau* rule is consistent with the policies of the exclusionary rule. The principal, if not the exclusive, purpose of the exclusionary rule is to deter constitutional violations by law enforcement officers by removing the incentive to commit those violations. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Janis*, 428 U.S. 433, 446 (1976). As the Court noted in *Janis*, "the exclusionary rule, as a deterrent sanction, is not applicable where a private party * * * commits the offending act." *Id.* at 456 n.31. Extension of the exclusionary rule to private searches would not advance the purpose of deterrence, since, unlike a law enforcement official, the private searcher "is often motivated by reasons independent of a desire to secure criminal conviction and * * * seldom engages in searches upon a sufficiently regular basis to be affected by the exclusion sanction." 1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* 113 (1978). See Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 Stan. L. Rev. 609, 614-615 (1967). The possibility of civil and criminal sanctions against a private party engaging in an illegal search is a sufficient deterrent against unofficial invasions of privacy. Any incremental deterrent benefits provided by imposition of an exclusionary sanction are outweighed by the substantial costs to society of failing to have the guilty brought to book. See, *e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268, 275-276 (1978); *United States* v. *Janis*, *supra*, 428 U.S. at 453-454; *United States* v. *Calandra*, 414 U.S. 338, 349, 351



(1974); *Alderman* v. *United States*, *supra*, 394 U.S. at 174-175.[18]

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[18] Relying on *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), petitioner Walter argues (Br. 23-24) that a private search and seizure becomes a governmental search and seizure when items obtained in a private search are admitted into evidence at trial. In *Shelley*, the Court held that judicial enforcement by state courts of restrictive covenants based on race or color violated the Equal Protection Clause of the Fourteenth Amendment. The continued vitality of *Burdeau* has not been put in doubt by *Shelley*. See 1 W. LaFave, *supra*, at 138-139. In *Shelley*, "the lower court was asked to compel a private citizen to do an act which would be unconstitutional for the state to perform," whereas in the private search context the court is "merely asked to give evidentiary status to illegally seized information." Comment, 46 Minn. L. Rev. 1119, 1124-1125 (1962). Furthermore, in the private search situation, the constitutional violation, if any, has already occurred at the time of the search or seizure. A ruling on a suppression motion will neither create nor eliminate the violation. See Note, *supra*, 19 Stan. L. Rev. at 614. By choosing to admit evidence garnered during a private search and seizure, a court is not sanctioning the private action; rather it is merely recognizing that no deterrent purpose will be served by the exclusion of that evidence in a criminal trial.

In addition, we note that the holding in *Shelley* v. *Kraemer* has been limited to its factual setting. See, *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963). For example, in *Moose Lodge* the Court noted that where the impetus for the discrimination is private, the State must have " 'significantly involved itself with invidious discriminations * * * in order for the discriminatory action to fall within the ambit of constitutional prohibitions.' " 407 U.S. at 173, quoting *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967); see also *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Thus, the Court held in *Moose Lodge* that a state's grant of a liquor license to a private club that practiced racial discrimination did not render the discriminatory practice of that club "state action" for purposes of the

In the instant case, as both the district court (A. 28-29) and the court of appeals (Pet. App. 4) found, the L'Eggs personnel took possession of, and inspected the packages that appeared to be addressed to L'Eggs because they were concerned that someone was using the company's name to transport obscene material in interstate commerce. Petitioners, who used fictitious names in shipping the packages containing obscene films, were thus responsible for L'Eggs' acquisition and examination of the packages and their contents. The actions of the L'Eggs employees are a far cry from the blatantly improper conduct engaged in by the private detectives in *Burdeau*. Unlike the situation in *Burdeau*, this is not a case where petitioners' private materials "were stolen [and] [t]he thief, to further his own ends, delivered them to the law officer of the United States." *Burdeau* v. *McDowell*, *supra*, 256 U.S. at 476 (Brandeis, J., dissenting).

In any event, as both courts below found (A. 33; Pet. App. 7), the "seizure" and "search" of the packages by the L'Eggs employees were not precipitated or participated in by government agents. Neither was accomplished with the government's knowledge or in the government's presence. Neither was performed for the purpose of assisting in law enforcement, or as a means of gaining any benefit from the government. Nor was L'Eggs performing what is normally a governmental function when it

Equal Protection Clause of the Fourteenth Amendment. Here, receipt by the government of evidence obtained during a private "search" did not change the character of the search.



picked up and opened the packages that appeared to be addressed to it.[19] In sum, it is plain that both the seizure and search by L'Eggs were, in every sense of the word, private.[20] Accordingly, the actions of the L'Eggs employees provide no basis for exclusion of the films from evidence at petitioners' trial. The only remaining question under the Fourth Amend-

[19] Some have argued, based on the reasoning of this Court in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), that the exclusionary rule should apply to unlawful searches by private parties acting in the capacity of government officials, such as security guards who perform a law enforcement function in a private business. See Note, *supra*, 19 Stan. L. Rev. at 614-618. See also *United States* v. *Francoeur*, 547 F.2d 891, 893-894 (5th Cir.), cert. denied, 431 U.S. 932 (1977); *United States* v. *Ellison*, 469 F.2d 413, 414-415 (9th Cir. 1972). Although we submit that the deterrent effect of extending the rule to those situations would be *de minimus*, there is no reason to decide the question here. It cannot be argued that L'Eggs' employees, by picking up a parcel apparently addressed to the company, were performing a quasi-governmental function.

In his dissent, Judge Wisdom stated (Pet. App. 19) that a Greyhound employee, on the instructions of the FBI, refused to inform petitioners that the packages had been taken to L'Eggs' offices. Apart from the fact that the district court refused to credit this evidence (A. 34), it has no bearing on whether the L'Eggs employees acted at the behest of the government in taking and opening the packages and turning them over to the FBI.

[20] Viewing the *Burdeau* holding "in its broadest sense," Judge Wisdom, dissenting below, observed that it "permits the government to accomplish circuitously what it could not accomplish directly" (Pet. App. 29). Whether that observation has any validity, it has no bearing here, where an unintended recipient received packages and, upon examining their contents, turned the packages over to the government on its own initiative.

ment is whether, after L'Eggs turned the films over to the FBI, the government's receipt, and subsequent viewing, of the films without first obtaining a warrant constituted an unreasonable "seizure" or "search."

### 2. *There Was No "Seizure" Under The Fourth Amendment When The Films Were Transferred To The Government By L'Eggs*

As we have shown, the Fourth Amendment did not restrict L'Eggs' freedom to take possession of and search the 12 packages containing the films. Furthermore, once L'Eggs had dominion and control over the property, so far as petitioners' Fourth Amendment rights are concerned, L'Eggs was at liberty to dispose of the packages as it wished; it could have kept the films, discarded them in the trash, or returned them to Greyhound. As it happens, once the L'Eggs employees discovered the nature of the films, they contacted the FBI and, as both courts below found (A. 33; Pet. App. 9), voluntarily turned the films over to the government. Petitioners contend (Walter Br. 24-28; Sanders Br. 13-14) that the government's acceptance of the films without first procuring a warrant constituted an unreasonable seizure and violated petitioners' rights under the Fourth Amendment. We disagree.

To begin with, as the court of appeals correctly observed, the argument that a warrant is needed before government agents may obtain property discovered in a private search is inconsistent with *Burdeau* v. *McDowell*, *supra*, and its progeny (Pet.



App. 8): "In every such case, introducing the fruits of a private search as evidence was impossible unless the private party had at some point surrendered the articles to the Government. Yet [neither the court of appeals nor this Court has ever] held that government acceptance of those articles constitutes a seizure requiring compliance with the warrant requirement, even in cases where no exception to that requirement would have covered the Government's action."

This observation is consistent with this Court's statement in *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906), that a "seizure" in Fourth Amendment terms contemplates a forcible dispossession of the owner. We submit that, just as a policeman may engage in personal intercourse with an individual without effecting a seizure of that person under the Fourth Amendment (see *Terry* v. *Ohio*, *supra*, 392 U.S. at 19 n.16), so too the actions of government agents in accepting property voluntarily relinquished by its possessor are not subject to scrutiny under Fourth Amendment standards.

Petitioners, however, advance three arguments in support of their contention that the government's acceptance of the films was a seizure. First, they argue that the transfer of the films was a deprivation of their property interests (Walter Br. 28; Sanders Br. 14); second, they assert that L'Eggs had no authority to consent to the transfer (Walter Br. 27); and third, they contend that because their First Amendment rights were implicated, the transfer must be

deemed a seizure under the Fourth Amendment (Walter Br. 28; Sanders Br. 13-14). None of these arguments is persuasive.

a. When L'Eggs' employees opened the packages and inspected their contents, petitioners lost any legitimate expectation of privacy they may have had with respect to the films. Nevertheless, they argue that the government's receipt of the films was a seizure because petitioners retained a "property interest" in the films.[21] But this approach elevates "arcane distinctions" developed in the law of property over the privacy interests that the Fourth Amendment is meant to protect. Under the Fourth Amendment, an individual's interest in property is relevant, if at all, only in determining whether that person has a reasonable expectation of privacy in the property. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12. Once that expectation of privacy has been removed as the result of a private search, the individual is not entitled to the exclusionary remedies of the Fourth Amendment, regardless of his proprietary relationship to the property. One method of asserting one's property interests is by filing a motion for

[21] We do not dispute petitioners' assertion that they had a "property interest" in the films. At the suppression hearing petitioners Walter and Sanders testified that they had owned the films and had ordered their shipment to Atlanta. Indeed, petitioner Walter admitted that he had originally purchased the films and was aware of their contents (XII Tr. 226). Under *Simmons* v. *U.S.*, 390 U.S. 377, 399 (1968), the government could not use this testimony at trial to prove Walter's scienter, and instead had to rely on circumstantial evidence. See pages 58-60, *infra*.



return of the items, although the owner's property interests are subject to the government's superior interest in retaining property that may be used as evidence. *United States* v. *Sherwin*, 539 F.2d 1, 8 n.10 (9th Cir. 1976) (en banc).[22] Petitioners did not move for return of their property, however, until after indictment, almost 20 months after they were informed that the films had been transferred from L'Eggs to the government (see page 42, *infra*).

Nor do we perceive what purpose a search warrant would have served in this case. The protection afforded by a warrant "consists in requiring that * * * inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). But probable cause is irrelevant in the case of a consensual transfer such as occurred here. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973). In accepting the films, the government was simply complying with the request of a reputable firm seeking to dispose of what appeared to be "hard core" pornographic material that apparently had been addressed to it. In these circumstances, even had a warrant been sought and the judicial officer determined that there was no prob-

[22] An aggrieved owner of property wrongfully taken in a private search may also institute a civil action against the offending party, and seek to press criminal charges (see page 23, note 16, and page 24, *supra*).

able cause for its issuance, it is difficult to believe that the government could realistically have refused to perform the custodial role of taking possession of the films at the behest of L'Eggs. This is particularly so where, as here, neither L'Eggs nor the government was then aware of the shipper's identity. In a word, for the government to have secured a warrant when it accepted delivery from L'Eggs would have been an empty ritual diluting the high purpose the warrant requirement is meant to serve. See *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967).

b. In our view, the FBI's receipt of the packages from L'Eggs is indistinguishable for Fourth Amendment purposes from other situations in which the government is called upon to relieve a citizen of unwanted material. Just as the police may, without a warrant, accept an objectionable, unsolicited mailing from a private recipient, so too should the government accommodate the unintended recipient of a shipment of obscene films seeking to divest itself of the films for fear that someone is using its name to conduct a pornographic business. Petitioner Walter contends, however, that L'Eggs had no authority to consent to the transfer. That contention is contrary to this Court's decision in *Coolidge* v. *New Hampshire*, *supra*.

In *Coolidge*, the police came to the defendant's home to question his wife about his activities on the night of the crime. During the questioning, she voluntarily produced four of her husband's guns and



some of his clothing and asked the police officers if they wanted to take them. The Court held that the police could accept Mrs. Coolidge's offer without first obtaining a warrant, despite the lack of any proof that she had authority to transfer her husband's property to the police. Citing *Burdeau* v. *McDowell*, *supra*, the Court observed that "[h]ad Mrs. Coolidge, wholly on her own initiative, sought out her husband's guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence." 403 U.S. at 487. And, in language as telling here as in *Coolidge*, the Court stated that "it is no part of the policy underlying the Fourth * * * Amendment[] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Id.* at 488.

In circumstances similar to those present here, the Ninth Circuit, sitting en banc in *United States* v. *Sherwin*, *supra*, concluded (539 F.2d at 7-8):

> For the purpose of determining if a seizure has taken place, * * * only the fact of consent is relevant, not whether it was properly authorized. * * * The private person's legal authority to approve a transfer of objects found in a private search has no bearing on whether his relinquishment of those objects to the government is coerced or voluntary. * * * If a transfer is voluntary, then it is not a seizure and the fourth amendment's reasonableness standard is simply inapplicable.

Thus, the legitimacy of the transfer in this case does not turn on whether petitioners authorized it. In relinquishing the films, L'Eggs was not acting as petitioners' agent; indeed, L'Eggs' representatives were unaware that petitioners were the owners of the films. Rather, the transfer here occurred wholly on L'Eggs' own initiative and with its own legitimate motivation. By shipping the films under fictitious names, petitioners assumed the risk that the films would voluntarily be turned over to the government by an unintended recipient. They should not now be heard to complain that the relinquishment of the films was not pursuant to their authorization.

Petitioners heavily rely (Walter Br. 24-25, 27-28; Sanders Br. 14) on *United States* v. *Kelly*, 529 F.2d 1365 (8th Cir. 1976), in support of their position that the government was required to obtain a warrant before accepting the films from L'Eggs. But *Kelly* is readily distinguishable on its facts. In *Kelly*, the defendant used a common carrier to ship merchandise to his adult bookstore. On seven or eight occasions, the carrier discovered that the packages had been broken into and contained obscene materials; each time it notified the FBI which, in turn, inspected the packages, often taking samples, before the remainder of the shipment was released for delivery. On these facts, the Eighth Circuit held (529 F.2d at 1371) that even though the books and magazines were taken with the consent of the carrier, that consent did not satisfy Fourth Amendment requirements—citing, *inter alia*, *Stoner* v. *California*, 376 U.S. 483 (1964), where the government pur-



posely sought to use a third party to institute a governmental search in order to circumvent the warrant requirement. Accordingly, to the extent that *Kelly* reaffirms the *Stoner* rationale it is not inconsistent with our position here, for it is beyond serious dispute that neither Greyhound nor L'Eggs had any working arrangement with the government. To the extent, however, that *Kelly* may be read as requiring a warrant before the government can accept a voluntary turnover of films from a common carrier, we think it was wrongly decided because it misconceives the nature of the third party search doctrine. Indeed, the continued vitality of *Kelly* is questionable even in the Eighth Circuit. See *United States* v. *Roberts*, No. 79-1396 (8th Cir. Nov. 13, 1979), slip op. 9. In any case, we submit that legitimate privacy interests are greater where materials are shipped under the true names of the sender and recipient, as in *Kelly*, than where, as here, they are shipped under fictitious names.

c. The court in *Kelly* also based its ruling on the ground that the books and magazines involved in that case were "presumptively protected by the First Amendment," and that the warrantless "seizure" of those items was therefore unreasonable under the Fourth Amendment (529 F.2d at 1372-1373). Petitioners take essentially the same position (Walter Br. 28; Sanders Br. 13-14). We turn to examine this contention.

The setting in which a "seizure" has taken place is an important factor in determining whether that seizure complied with the requirements of the Fourth

Amendment. *Roaden* v. *Kentucky*, 413 U.S. 496, 501, 503-504 (1973). Thus, before the government may seize "arguably protected" material that is in the process of being distributed or exhibited to the public, it must first obtain a constitutionally sufficient warrant from a magistrate who has had an opportunity to focus searchingly on the question of obscenity. See *Roaden* v. *Kentucky*, *supra*; *Heller* v. *New York*, 413 U.S. 483 (1973); *Marcus* v. *Search Warrant*, 367 U.S. 717, 731-732 (1961). When books or films are forcibly seized in such a setting, First Amendment values are implicated, because the seizure brings "to an abrupt halt an orderly and presumptively legitimate distribution or exhibition." *Roaden* v. *Kentucky*, *supra*, 413 U.S. at 504.

But that is not even remotely the case here. The government did not "seize" the material; instead, it acquired the material pursuant to a legitimate consensual transfer by L'Eggs (see pages 28-34, *supra*). Neither *Roaden* nor any other decision of this Court suggests that the government must obtain a judicial determination of probable obscenity before accepting material that is voluntarily tendered to it. Moreover, unlike the situation in *Roaden* and the cases cited therein, there was no taking from a bookstore or commercial theater,[23] nor were the

[23] "The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes * * * [the] Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden* v. *Kentucky*, *supra*, 413 U.S. at 504 (footnote omitted). This case is therefore clearly distinguishable from *Lo-Ji Sales, Inc.* v. *New York*, *supra*, in which the police conducted a wholesale search and seizure on the premises of a bookstore in the absence of a valid consent.



films on the "threshold of dissemination" (*Heller* v. *New York*, *supra*, 413 U.S. at 492 n.8; *Mishkin* v. *New York*, 383 U.S. 502, 513 (1966)) when the FBI accepted the shipment from L'Eggs. On the contrary, the films were not in the process of distribution at all. They had already been distributed to various adult bookstores in Florida, but had not been sold and, accordingly, petitioners decided to return the films to a warehouse for storage, with no apparent plans for further circulation. Thus, the public had been given an opportunity to purchase the films and had rejected that opportunity.

Furthermore, by the time the FBI took possession of the films, they had left the distribution chain completely and had come to rest at the L'Eggs hosiery company, whose employees were understandably anxious to rid themselves of the films and thereby protect the company's name. The FBI accepted L'Eggs' offer of the films with the twofold purpose of assisting L'Eggs and investigating a possible crime. In sum, viewing the "setting in which they were taken" (*Roaden*, *supra*, 413 U.S. at 503), no serious claim can be made that the transfer of the films from L'Eggs to the FBI had even an attenuated connection with First Amendment interests. It would demean First Amendment principles to apply a rule of exclusion to obscene material misdirected to a private

party where the true interest of the sender was to remove the material from circulation.[24]

### 3. *The Government's Screening of the Films Did Not Violate Petitioners' Fourth Amendment Rights*

Approximately one month after acquiring the films from L'Eggs, FBI agents screened the films. Petitioners both contend (Walter Br. 29-34; Sanders Br. 17) that this viewing of the films by the FBI constituted a new "search" distinguishable from the earlier private search conducted by the employees of L'Eggs. They argue that this different search could only be made pursuant to a warrant. But merely characterizing the screenings as a distinct "search" does not advance petitioners' argument. Without a legitimate expectation of privacy, no Fourth Amend-

[24] None of the First Amendment concerns raised by petitioner Walter (Br. 28) is applicable here. This is not a situation in which there has been "government sanctioned private censorship without judicial supervision"; rather, L'Eggs' personnel took possession of the packages and transferred them to the government because they were concerned that the company might be implicated in criminal activity. Nor is there any danger that dissemination of legitimate expression by common carrier might be deterred; while shippers such as petitioners might no longer use fictitious names when sending "arguably protected" material by common carrier, so far as we are aware there is no First Amendment right to ship goods under false names. In addition, as we have demonstrated, on the facts of this case there was no problem of prior restraint in the transfer of the films from L'Eggs to the government. The transfer was not for the purpose of destruction or censorship, and the public had already rejected the opportunity to purchase the films.



ment violation can occur. We submit that once the boxes had been opened and the individual film containers inspected by L'Eggs' personnel, petitioners lost any reasonable expectation of privacy they may have had concerning the contents of the films, and may not invoke the Fourth Amendment exclusionary rule to obtain their suppression.[25]

Petitioners can draw no support from *United States* v. *Chadwick*, 433 U.S. 1 (1977) and *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979). Those cases hold that, absent exigent circumstances, closed items of luggage lawfully seized by the police may not be opened and searched without a warrant. The basis for the Court's holdings was the recognition that luggage is a common "repository for personal effects" and therefore is inevitably associated with the expectation of privacy. *United States* v. *Chadwick*, *supra*, 433 U.S. at 11-13; *Arkansas* v. *Sanders*, *supra*, slip op. 9, 11. Unlike personal luggage, film cartons are not intended as a "repository of personal effects." Moreover, unlike the closed pieces of luggage involved in *Chadwick* and *Sanders*, there was no secret as to what the film cartons contained. The outside of each carton graphically advertised its contents: one side presented a picture of two nude men

[25] The government's acquisition of the films pursuant to a consensual transfer was lawful. Thus, even if the screening of the films following that transfer did intrude upon petitioners' legitimate expectations of privacy, the use of the films as evidence at trial was not the "fruit" of that impropriety and suppression would not be an appropriate remedy. Cf. *United States* v. *Crews*, No. 78-777, argued Oct. 31, 1979.

kissing; the other side bluntly described the sexual conduct portrayed on each film (Pet. App. 10-11 n.5). As the Court noted in *Arkansas* v. *Sanders*, *supra*, slip op. 11 n.13:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.

Had the exteriors of the luggage in *Chadwick* and *Sanders* borne signs that said: "This luggage contains marijuana," we assume that the Court would have upheld the searches because in those circumstances the defendants would no longer have had any justifiable expectations of privacy in the contents of their luggage. Since the exterior of the individual film cartons in this case proclaimed the nature of their contents, petitioners likewise had no remaining Fourth Amendment privacy interest in the reels of film. A film is not a container in which something is secreted away; it is instead a series of miniature photographs intended to be magnified by a projector and viewed in rapid sequence. There could be little doubt as to what each frame depicted since each carton described the portrayed sexual activity in a manner intended to entice the reader to view the film.[26] Ac-

[26] Even if the containers had not described the actions portrayed in the films, the screening was not a "search." As



cordingly, since the viewing of the films with the aid of a projector did not invade any protected "zone of privacy," FBI Agent Mandyck did not need a warrant to screen the films.[27]

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Judge Webster stated in *United States* v. *Haes*, 551 F.2d 767, 772-773 (8th Cir. 1977) (dissenting opinion; footnote omitted):

> The Fourth Amendment prohibits *unreasonable* searches and seizures. To characterize the inspection of the film by the FBI agents as an independent search requiring application of the exclusionary rule goes too far, in my opinion * * *.
>
> Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier employee could not reasonably open the publication and peruse its pages to determine whether its contents offended the law? * * * Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search independent of the lawful private search which produced the object? I think clearly not.
>
> The film in this case was not a means of concealing something else. In looking at the film through a projector, the agents did no more than view the motion pictures in the manner in which they were intended to be viewed.

[27] Petitioner Walter relies (Br. 31) on *United States* v. *Tupler*, 564 F.2d 1294 (9th Cir. 1977) to support the proposition that the descriptions on the film containers did not provide probable cause to believe that the films were obscene and would not have supported the issuance of a warrant. In *Tupler* the Ninth Circuit held that unless either the policeman or the magistrate views the allegedly obscene films himself prior to the issuance of a warrant for their seizure, the warrant is invalid as having been issued on less than probable cause. The government had argued that the descriptions on the film cartons were sufficient to support a finding of probable cause. Whether or not *Tupler* was correctly decided, it has no

### C. The Retention Of The Films By The Government Without A Judicial Determination Of Obscenity Does Not Require Suppression

At the time the government received the films from L'Eggs, it was unaware of the true identities of either the shipper or the intended recipient of the packages. Several weeks after the transfer, co-defendant Michael Grassi, petitioners' employee, was informed by a L'Eggs representative that the films were in the possession of the FBI.[28] Grassi, in turn, notified petitioners, who attempted to dispose of any evidence connecting them to the films. Petitioners never contacted the FBI regarding the films, and did not request the return of their property until they filed a motion to suppress almost 20 months after having received actual notice that the films were in the government's custody. Petitioners contend (Walter Br. 34-38; Sanders Br. 11-13, 15-17) that the government's failure to notify them directly that it had the films, and its failure to seek a judicial determination of obscenity during the preindictment stage, amounted to a prior restraint of expression under the First Amendment and required suppression of the films from evidence at petitioners' trial.

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relevance here. Unlike *Tupler*, this case involves not a "seizure" of films from a bookstore, but a viewing of films that had been consensually transferred to the government by an unintended recipient. Further, we do not argue that the carton covers gave the FBI agents probable cause to view the films; rather, our contention is that the descriptions of the films on the carton covers eliminated any legitimate expectation of privacy petitioners may have had in the films.

[28] The FBI was subsequently notified that Grassi had inquired about the films.



#### 1. *The Government's Failure To Give Petitioners Direct Notification That It Had The Films Does Not Warrant Exclusion Since Petitioners Had Actual Notice Of That Fact*

We recognize that elementary considerations of fairness ordinarily would require that government agents notify the owner, if his identity is known, of their seizure and possession of expressive material, so that the owner may seek return of the material. Rule 41(d), Fed. R. Crim. P., requires that the officer "shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken." Accordingly, if the government had "seized" the films from L'Eggs, it would have been required to serve the company with the warrant and a receipt. While Rule 41 does not provide for any type of notice that would have reached petitioners, nevertheless, it would seem to follow that all parties whom the government has reason to believe would be affected by a taking should be notified. Thus, where the government "seizes" a telephone conversation by wiretap, it must thereafter inform the court of all classes of intercepted parties so that the court in turn can notify those intercepted parties who are under investigation that their conversations were seized. 18 U.S.C. 2518(8)(d); *United States* v. *Donovan*, 429 U.S. 413 (1977). In those circumstances notice would be constitutionally compelled.

See *Berger* v. *New York*, 388 U.S. 41, 60 (1967). Cf. *Katz* v. *United States*, *supra*, 389 U.S. at 368.

In other contexts, this Court has concluded that principles of due process require that a person be given notice of a pending proceeding as a consequence of which he may lose some property. See, *e.g.*, *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950). As the Court stated in *Mullane*, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* at 314. In short, we recognize that as a practical matter, the government cannot expect a party to seek the return of his property unless the party knows where it is.[29]

However, because the record in this case reflects that petitioners had actual notice that the government had possession of the films, the government's failure to provide direct notice to petitioners resulted in no constitutional violation—much less one requiring the exclusion of trustworthy evidence. Whenever

[29] We note, however, that this notice need not invariably be a formalized procedure. If the government, upon receipt of books, papers or films, does not seek permanently to deprive the owner of his property, we submit that the owner is entitled to notice of a most informal nature. For example, oral notice in the manner of a telephone call or personal conversation should dispense with the government's obligation. See *Goss* v. *Lopez*, 419 U.S. 565, 579-581 (1975) (oral notice sufficient to afford a student an opportunity to object to his suspension from school).



notice is constitutionally required the object is to ensure that the owner of materials arguably protected by the First Amendment will be able to exercise his right to seek their return and thereby curtail any infringement of his First Amendment interests. Manifestly, where the owner knows that the government has his property, he possesses all the knowledge that is necessary to seek its return. Here petitioners had actual knowledge that the FBI held their films. They were entitled to no more.

### 2. *The Government's Failure To Seek An Evidentiary Hearing On The Issue Of Obscenity Did Not Violate Petitioners' First Amendment Rights*

This Court has held that "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965). See *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 367 (1971); *Heller* v. *New York*, *supra*, 413 U.S. at 489. Thus, where expressive material has been seized with a view toward its absolute suppression through censorship or destruction, a prompt judicial determination of the obscenity issue in an adversary proceeding must be made at the request of any interested party. *Id.* at 492. See also *Lo-Ji Sales, Inc.* v. *New York*, *supra*, slip op. 8.

We note that the government accepted L'Eggs' offer of the films both in a caretaking capacity and with a view to initiating an investigation into a possible violation of the federal obscenity laws. That these were the factors which motivated the government is incontestable on the record. Recognition of this fact considerably narrows the compass of the First Amendment inquiry related to the FBI's retention of the films. To begin with, the films were not being retained by the government for the sole purpose of their destruction (compare *Marcus* v. *Search Warrant, supra*; *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964)), or as part of a scheme to ban the exhibition or distribution of the films for purposes of censorship. See *Freedman* v. *Maryland, supra*; see also *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968); *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). Nor does this case come to the Court as part of a system of prior restraint "bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963); see also *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957); *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43 (1961); *Freedman* v. *Maryland, supra*.[30] Finally, there is not a scintilla of

[30] The question of the constitutional limits of state power in this regard is again before the Court in *Vance* v. *Universal Amusement Co.*, No. 78-1588, argued, Nov. 28, 1979.



evidence in the record that the government's retention of the films was meant to or had a "chilling effect" on the free exercise of petitioners' First Amendment rights (compare *Bantam Books, Inc.* v. *Sullivan, supra*),[31] or that it "'[became] a form of censorship.'" *Heller* v. *New York, supra*, 413 U.S. at 490.

In the present case, petitioners were not threatened that they would be prosecuted for selling other copies of the "David's Boys" films. The only plausible fear that petitioners might have harbored was that the government would prosecute them for the shipment in question. Furthermore, the retention of the films by the government pending indictment did not limit the public's access to the films in question, or restrict petitioners' freedom of expression. Indeed, the public had declined the opportunity to purchase the films and the films were therefore being returned for storage.

Moreover, petitioners do not contend that an adversary proceeding would not have been provided to them upon request. Instead, they argue that it was the government's obligation to arrange for an adversary proceeding on its own initiative, even though petitioners, who had actual notice that the films were

[31] In *Bantam Books*, the Rhode Island Commission reviewed books and made recommendations that criminal prosecutions be commenced against the distributors of those books which it deemed objectionable. The effect of the commission's action was that booksellers were "coerc[ed], persuad[ed] and intimidat[ed]" into not selling the named books by the "threat of invoking legal sanctions." 372 U.S. at 67.

in the government's possession, did not request any such proceeding. Petitioners made no motion for return of property until almost 20 months after they received notice concerning the whereabouts of the films. In these circumstances, "it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner[s] had desired." *Heller* v. *New York*, *supra*, 413 U.S. at 490. Petitioners' failure to seek adversary resolution of the issue defeats their claim, since "those delays caused by the choice of the defendant" are "definitely excluded from any consideration of 'promptness.'" *Ibid.* In these circumstances, petitioners cannot claim an infringement of their First Amendment rights.[32]

Finally, as the court of appeals correctly observed (Pet. App. 38-39), even if their First Amendment rights were violated, petitioners were entitled to no more than the return of the films, not their suppression at trial. See *Heller* v. *New York*, *supra*, 413 U.S. at 493 n.11. See also, *e.g.*, *United States* v. *Bush*, 582 F.2d 1016, 1020-1022 (5th Cir. 1978); *United States* v. *Womack*, 509 F.2d 368, 382 n.48 (D.C. Cir. 1972), cert. denied, 422 U.S. 1022 (1975). Because

[32] Petitioner Walter asserts (Br. 36-37 n.9) that he had no duty to request the return of the property because it was not seized pursuant to a warrant. But Rule 41(e), Fed. R. Crim. P., authorizing a motion for return of property by a person aggrieved by an unlawful search or seizure, makes no distinction between seizures made with or without warrants.



petitioners' failure to obtain a prompt judicial determination of obscenity was their own doing, exclusion of the evidence would serve no deterrent purpose.

## II. THERE IS NO MERIT TO THE TRIAL-RELATED ISSUES RAISED BY PETITIONERS

### A. The Trial Court Correctly Charged The Jury On The Issue Of Community Standards

This Court first held that the obscenity vel non of particular materials should be judged by their "impact upon the average person in the community" in *Roth* v. *United States*, 354 U.S. 476, 490 (1957).[33] Whatever the geographic limits of the relevant community,[34] "the Court has never varied from the *Roth*

[33] The average person standard altered the existing test of *Regina* v. *Hicklin*, L.R. 3 Q.B. 360 (1868), that obscenity be judged by the views of the most susceptible and sensitive members of society. *Roth* v. *United States*, *supra*, 354 U.S. at 488-489. It also permitted the materials in question to be judged objectively rather than by the "subjective personal and private views" of each individual juror. *Pinkus* v. *United States*, 436 U.S. 293, 300 (1978).

[34] Although *Roth* v. *United States*, *supra*, did not define the geographic boundaries of the "community", the Court applied a national standard in the cases subsequent to *Roth*. See *Jacobellis* v. *Ohio*, 378 U.S. 184, 195 (1964); *Manual Enterprises* v. *Day*, 370 U.S. 478, 488 (1962). The national standard was abandoned and a local community standard was adopted in *Miller* v. *California*, 413 U.S. 15, 30-34 (1973). One Term later, in *Hamling* v. *United States*, 418 U.S. 87, 107 (1974), the Court held that an instruction employing a national standard "does not render [the] convictions void as a matter of constitutional law * * *" because such an instruction accomplished the purpose of assuring "* * * that the material is judged neither on the basis of each juror's

position that the community as a whole should be the judge of obscenity, and not a small, atypical segment of the community." *Smith* v. *United States*, 431 U.S. 291, 300 n.6, 305 (1977). Accord, *Miller* v. *California*, 413 U.S. 15, 30 (1973); *Hamling* v. *United States*, 418 U.S. 87, 102-105 (1974); *Pinkus* v. *United States*, 436 U.S. 293, 299-302 (1978); *United States* v. *12 200-ft. Reels of Film*, *supra*, 413 U.S. at 129-130. In certain instances, the prurient appeal of materials may be assessed alternatively by reference to members of a deviant sexual group. See, *e.g.*, *Pinkus* v. *United States*, *supra*, 436 U.S. at 301-303; *Hamling* v. *United States*, *supra*, 418 U.S. at 127-129; *Mishkin* v. *New York*, *supra*, 383 U.S. at 505. But juries may not be instructed to consider the prurient appeal of the materials to children, where children are not involved in the case. *Pinkus* v. *United States*, *supra*, 436 U.S. at 297-298. As we now demonstrate, the instructions in this case did not depart from these settled principles.

### 1. *The "Average Person" Charge Did Not Violate The Rule of Pinkus v. United States*

The district court instructed the jury (A. 64, 66):

> "Obscene" means something which deals with sex in such a manner that the predominant appeal of the material, viewed in its entirety, is to the prurient interest of the average person of the

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personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." In the present case petitioners were tried under a local community standard, the community being the Middle District of Florida.



> community as a whole, or the prurient interest of a deviant sexual group, as the case might be * * *.
>
> Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment which must be made in light of contemporary standards as would be applied by the average person with an average, and normal attitude toward, and interest in sex.

At no time did the court instruct the jury that children were part of the community. Petitioners contend (Walter Br. 43-45; Sanders Br. 18-19), however, that this Court's holding in *Pinkus* v. *United States*, *supra*, 436 U.S. at 297-298, requires that the jury be instructed to assess the interests of the average "adult" rather than the average "person." We submit that the court of appeals was correct in holding that "[the district court's] instruction adequately directed jury consideration to the contemporary standards of adults and thereby avoided the danger emphasized in *Pinkus* * * *" (Pet. App. 15-17).

In *Pinkus*, unlike the present case, the trial judge instructed the jury that, in ascertaining community standards, "you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men women and *children*, from all walks of life." 436 U.S. at 296 (emphasis added). See also *United States* v. *Bush*, *supra*, 582 F.2d at 1021-1022 (jury instructed to include the "young" in the community). Even then, the Court acknowledged that "cogent ar-

guments can be made that the inclusion of children was harmless error" (*Pinkus, supra*, 436 U.S. at 297). Here, we submit, there is nothing approaching reversible error. While, as a general rule, it would be better practice specifically to instruct the jury that the average person is derived from a community of adults, mere failure to do so cannot compel reversal. In the present case, it should be noted, petitioners do not contest the obscenity of the films (Walter Br. 40-41; Sanders Br. 5). Moreover, as the court of appeals observed (Pet. App. 17), the district court adequately directed the jury to apply an adult standard when it instructed them to apply the standards of "the average person with an average and normal attitude toward, and interest in, sex" (A. 66).[35] There simply is no basis for concluding that the films here were judged by anything less than an adult standard.

### 2. *The District Court Properly Refused to Permit The Jury to Decide Whether The Term "Average Person" Is Impossible Of Calculation*

Petitioner Walter contends (Br. 52-54) that the district court failed to instruct the jury on his theory of the case, namely, that certain terms in the definition of obscenity are impossible to calculate. For

[35] Contrary to petitioner Walter's contention (Br. 44), reversal is not required simply because one prospective juror referred to his teenage children during voir dire (V Tr. 85). That prospective juror was not selected to hear the case. Nor was there reason to instruct the jury that children were not involved in this case since that fact was obvious from the evidence.



example, according to petitioner, because "average" is defined as the mean, the "average person" must embody the physical attributes of both men and women and must therefore be transsexual. But this is not a "theory of the case."[36] Rather, this is a vagueness challenge to the obscenity definition which presents a question of law within the province of the court, not the jury. *Berra* v. *United States*, 351 U.S. 131, 134 (1956); *Dennis* v. *United States*, 341 U.S. 494, 513 (1951). Cf. *Lego* v. *Twomey*, 404 U.S. 477, 490 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 89-90 (1963). And it is one that has been repeatedly resolved against the position petitioner advocates. See, *e.g. Roth* v. *United States, supra*, 354 U.S. at 487-492; *Hamling* v. *United States, supra*, 418 U.S. at 110-117; *Miller* v. *California, supra*, 413 U.S. at 23-30.

Furthermore, Walter's argument misconceives the jury's function in applying the average person test. The jury is not required to compute "some abstract formulation" (*Miller* v. *California, supra*, 413 U.S. at 30) or resolve a statistical equation to determine a mathematical average. Instead, obscenity is to be judged by the standards of a person who is average in his attitudes toward sex, "rather than the most prudish or the most tolerant." *Pinkus* v. *United States, supra*, 436 U.S. at 299; *Smith* v. *United States, supra*, 431 U.S. at 304. The average person test has been likened to the reasonable man test in

[36] We note in passing that a transsexual is a person who has undergone a change of sexual organs, not one who possesses both male and female sexual characteristics.

tort law. *Pinkus* v. *United States, supra,* 436 U.S. at 301. Both are means for employing an objective rather than a subjective standard; the jury is to "determine the collective view of the community." *Id.* at 300-301. It is apparent, therefore, that petitioner was not entitled to an instruction on his alleged "theory of the case."

### 3. *The District Court Properly Instructed The Jury To Consider The Prurient Appeal Of The Films Either To The Average Person In The Community Or To Members Of A Deviant Sexual Group*

Where all or part of the alleged obscene material caters not to the interests of the average person in society, but, rather, to members of a specific deviant group, the first prong of the three-part test for obscenity [37] may be adjusted to measure the prurient appeal of the materials to that group. *Pinkus* v. *United States, supra,* 436 U.S. at 301-303; *Hamling* v. *United States, supra,* 418 U.S. at 127-129; *Mishkin* v. *New York, supra.* As the Court stated in *Mishkin* (383 U.S. at 508-509):

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the

[37] In *Miller* v. *California, supra,* 413 U.S. at 24, the Court reformulated the test for obscenity vel non as follows: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."



> prurient-appeal requirement of the *Roth* [now *Miller*] test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.
>
> * * * * *
>
> We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group * * *.

Since the films were homosexual in orientation, the district court gave the following deviant appeal instruction (A. 65-67):

> The first test to be applied, therefore, in determining whether given material is obscene, is whether the predominant theme or purpose of the material, * * * when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole, or the prurient interest of members of a deviant sexual group, as the case might be.
>
> * * * * *
>
> In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals.

Petitioner Walter first contends (Br. 46) that "the instruction given precluded any consideration whether

the films had a prurient appeal to members of the homosexual community." But this claim is answered by the charge itself. On three separate occasions the district court instructed the jury that it could consider the prurient appeal of the films to members of a deviant sexual group (in addition to the two above-quoted portions of the charge, see A. 64). Petitioner Walter argues, however, that the district court shifted the burden of proof to the defendants when it charged that deviant appeal to homosexuals could only be considered "if you find, *beyond a reasonable doubt*, that the material was intended to appeal to the prurient interest of such a group" (A. 67; emphasis added). Petitioner's interpretation of the charge is patently incorrect. The burden was on the government to show that the films were intended for homosexuals before it was entitled to a deviant appeal instruction.[38] See *Pinkus*, *supra*. There was no shifting of burdens here.[39] In any event, we cannot appreciate how petitioner was prejudiced if the jury was foreclosed from considering prurient appeal to homosexuals. If, indeed, the jurors were limited to considering the "average person," they presumably found

[38] Of course the films themselves were sufficient evidence to warrant the deviant appeal charge. *Pinkus* v. *United States*, *supra*, 436 U.S. at 301-303; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 (1973).

[39] Petitioner does not deny that the district court instructed the jury that the government was required to prove guilt beyond a reasonable doubt. (See XI Tr. 199, 200, 204, 207, 212, 219, 224, 225).



it *more* difficult to conclude that the films appealed to prurient interest.

### B. The Evidence Of Petitioner Walter's Scienter Was Sufficient To Support His Conviction

The purpose of requiring proof of scienter in an obscenity prosecution is to prevent booksellers and others from being convicted for merely possessing an obscene book, "even though they had not the slightest notice of the character of the books they sold." *Smith* v. *California*, 361 U.S. 147, 152 (1959). In *Mishkin* v. *New York*, *supra*, 383 U.S. at 510-511, and *Ginsberg* v. *New York*, 390 U.S. 629, 644 (1968) (emphasis omitted), the Court upheld the constitutionality of a scienter definition which indicated "that only those who are in some manner aware of the character of the material they attempt to distribute should be punished."[40] At the same time, however,

[40] On the element of scienter, the trial court in this case charged (A. 63-64):

> One of the essential elements the Government must prove is the element of scienter or knowledge; that is, that the defendant knew the general nature of the contents of the articles which were transported in interstate commerce. The Government does not have the obligation of showing that the defendant knew that such articles were in fact legally obscene.
>
> Therefore, if you find beyond a reasonable doubt that the defendant transported in interstate commerce the articles in question, and that he knew the general nature of the articles, that is, he knew what they actually were, and if you find beyond a reasonable doubt that the articles were in fact "obscene" within the meaning of these instructions, then you may find that the defendant had the requisite knowledge, or scienter as we call it in the law.

"[e]yewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents." *Smith* v. *California*, *supra*, 361 U.S. at 154. Nor is the government constitutionally required to prove that a defendant knew that any of the films in question was legally obscene. *Hamling* v. *United States*, *supra*, 418 U.S. at 123. It is enough that the defendant is shown to know "the character and nature of the materials." *Ibid.* Here, as the court of appeals held (Pet. App. 13-15), there was sufficient evidence showing that petitioner Walter knew of, participated in, and consented to the acts charged in the indictment.

The evidence showed that Walter and Sanders jointly owned and operated an extensive network of 20 to 30 adult cinemas, bookstores, and distribution warehouses, including co-petitioners Gulf Coast News Agency and TWA (VI Tr. 50-61). More specifically, Walter hired the accountants for TWA and Gulf Coast News and provided them with instructions and information necessary to do the bookkeeping, payroll and tax work for the firms (VI Tr. 43, 55, 63, 67, 88-102). Walter also authorized the accountants to write checks on the companies' accounts (VI Tr. 60). One of the accountants, William Boshell, overheard Walter and Sanders admit that they were personally responsible for each store in the network (VI Tr. 112-113). Other employees at TWA, Gulf Coast News, or the individual adult bookstores also took orders from both Walter and Sanders, whom they described as the bosses, partners



and owners of the business (VI Tr. 171-172, 177, 180; VII Tr. 35, 184, 203, 210-211; VIII Tr. 52-53; IX Tr. 23-33, 39). Walter was frequently seen at the TWA and Gulf Coast News warehouses before and after the date of the shipment (September 25, 1975), and he maintained offices in both locations (VI Tr. 74-75, 116, 174; VII Tr. 17, 35, 38-39, 109; VIII Tr. 60-61; IX Tr. 40, 117-120).

From this day-to-day involvement in the business, it was reasonable to infer that Walter knew what character of materials were involved. But there was additional evidence of his guilty knowledge. Thus, despite the unquestioned authority of Walter and Sanders over the enterprise, they attempted to conceal their ownership interest in the business. Walter would not admit to his accountants that he owned any stock in the corporations (VI Tr. 65). Walter and Sanders told Boshell that no one owned the various companies and, indeed, the stock certificates were issued in blank (VI Tr. 103). When Boshell told petitioners that the owners of the stock would then be the holder of the certificates, Walter and Sanders referred him to their attorney, who in turn informed Boshell that TWA was owned by Michael Grassi and Gulf Coast News was owned by Wayne Schergen (VI Tr. 104-107; Pet. App. E). Carole Maxey, Sanders' girlfriend, was listed as the owner of the "Fun & Games" bookstore although she was unaware of that status and never participated in the store's profits (IX Tr. 18-20, 37-38). Similarly, when Ron Akins, a bookstore manager for Walter and Sanders, was desig-

nated president of four companies, including TWA, Akins received a raise of only ten dollars a week (from $125 to $135) and no share of the profits (VII Tr. 185-193).

There was also ample evidence as to the character and nature of the merchandise warehoused and distributed by Walter and Sanders at TWA and Gulf Coast News. The goods were limited to items normally sold in "adult" bookstores—books, magazines, newspapers and films that explicitly portrayed sexual conduct, including material described as "hardcore" pornography, in addition to "rubber goods" and "novelty items" (VI Tr. 51, 56, 173-176, 184, 196; VII Tr. 9, 37; VIII Tr. 62-65, 76). On several occasions, managers of these bookstores were arrested for selling obscene goods (VI Tr. 199; VII Tr. 9; VIII Tr. 70).

In short, there was more than sufficient evidence that Walter possessed the requisite knowledge. Whether or not he viewed the particular films involved in this case is immaterial; he could not help but be aware of the pornographic character of the wares he purveyed. This is not a case in which a legitimate bookseller inadvertently stocks an obscene book. See *Smith* v. *California*, *supra*. What is involved here is the shipment of 871 pornographic films worth thousands of dollars, a shipment too large to pass unnoticed. Walter has chosen to profit from the sale of explicit sexual material. He therefore has elected to take the risk that the interstate shipment of some of his merchandise may violate the



federal obscenity laws. *Hamling* v. *United States*, *supra*, 418 U.S. at 124.

**C. Petitioner Walter Was Not Denied A Fair Trial By The Alleged Inattentiveness Of A Juror**

After the jury had viewed three of the five films, counsel for petitioner Walter complained that two jurors were not paying attention. The trial court responded (A. 46-47):

> I made it a point to observe the jury from time to time during the publication of each of these exhibits. It seems to me that the jury is paying strict attention with the possible exception of Mr. Kohring and Mrs. Silver, who is not one of the jurors named by [petitioner's attorney].
>
> * * * * *
>
> On the other hand, it seems to me that, at least, I would say seven out of the ten times that I have observed or may have observed the jury, that those jurors were viewing the films, and they were noticed by me to have averted their eyes on two occasions.
>
> But I don't think the situation is one of such inattentiveness as requires intervention by me at this time.

The court thereafter instructed juror Kohring not to read during the exhibition of the films. The final two films were then shown. Thereafter, petitioner Walter requested that juror Kohring be excused. The court responded (A. 48):

> Well, I observed the jury * * * and made it a point to do so from time to time on numerous

occasions during the publication of the exhibits. And I would simply restate what I had to say at Sidebar at this particular time.

I do not believe that any individual juror was so inattentive during publication as to require excusal.

Petitioner Walter here contends that these rulings were error (Br. 48-49). But questions as to juror inattentiveness are particularly suited to determination by the trial court, who is in the position to observe the conduct and demeanor of the jury. Petitioner has offered no compelling reasons for doubting the accuracy of the judge's observations. The court of appeals accepted the findings of the trial court and there is no reason here for deviating from the well settled practice of this Court not to disturb a finding of fact concurred in by both lower courts. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967).[41]

**D. The District Court Did Not Abuse Its Discretion Concerning The Questions Asked Prospective Jurors On Voir Dire**

Petitioner Walter next complains (Br. 49-51) that the district court failed to ask prospective jurors several questions that he had requested. It is well settled that "[t]he propriety of a particular question is a decision for the trial court to make in the first

[41] Moreover, due to the repetitive nature of the five films, we submit that it was not necessary for each juror to watch every frame. An occasional aversion of the eyes was most likely the result of the offensive conduct portrayed on the films.



instance." *Smith* v. *United States*, *supra*, 431 U.S. at 308. Here, petitioner requested that the district court ask each prospective juror 122 separate questions, some of which had subparts. Quite rightly, the court was unwilling to ask them all, since to do so would have consumed more time than the trial itself. Instead, the court asked a more limited, but generous, number of pertinent questions (See V Tr. *passim*). The court's conduct of the voir dire demonstrated a prudent exercise of its discretion.

Petitioner specifically alleges that the district court refused to ask the prospective jurors how long they had resided in the community, a question which this Court described as possibly "helpful" in *Smith* v. *United States*, *supra*. Although the district court did not specifically address this question to each prospective juror, the court did question most jurors about either their period of residence in the community or the length of time spent at their present place of employment. See *e.g.*, V Tr. 100-101, 103-106, 108, 111, 179, 181, 182, 184, 221-223. Moreover, each juror called for jury duty had to reside in the community at least one year, a time sufficient to provide familiarity with local standards (II Tr. Doc. 61 and 62). In addition to numerous routine questions regarding such matters as employment and age, the court inquired about the jurors' opinions on the obscenity laws (V Tr. 85-86), whether any of the jurors were members of a committee or organization against pornography (V Tr. 87-88), whether any of

the jurors would be so shocked and offended by the homosexual nature of the films as not to be able to sit in judgment of them (V Tr. 90), whether the jurors were willing to acquit petitioners if the films were not obscene under the law (V Tr. 91), whether any of the jurors regularly subscribed to or purchased books, films or magazines that dealt explicitly with sex (V Tr. 91), and whether any of the jurors served at any time as an officer or deacon of a church (V Tr. 132-136). We submit that petitioner was entitled to no more.

**E. Petitioner Walter Was Not Entitled To A Severance**

It is settled law that the decision whether or not to grant a severance rests within the sound discretion of the district court. *United States* v. *Crawford*, 581 F.2d 489, 491 (5th Cir. 1978); *United States* v. *Adams*, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978); *United States* v. *Jones*, 578 F.2d 1332, 1339 (10th Cir.), cert. denied, 439 U.S. 913 (1978). Generally, the court acts within its lawful discretion in denying a motion to sever where a single set of facts and evidence will prove the charges against both defendants, since by avoiding multiple trials, judicial efficiency and economy are promoted. See *Bruton* v. *United States*, 391 U.S. 123, 131 n.6 (1968). These principles were served in this case.

Here, the evidence proving the shipment of the five films and their obscenity was essentially the same against both Walter and Sanders. Also, the same witnesses were used to show the partnership role of



both men in TWA and Gulf Coast News and thus their scienter. Further, the indictment charged a conspiracy, the presence of which renders joinder appropriate under Rule 8, Fed.R.Crim.P., absent bad faith on the part of the government in charging conspiracy. See *Schaffer* v. *United States*, 362 U.S. 511 (1960); *Peterson* v. *United States*, 405 F.2d 102, 105-106 (8th Cir. 1968), cert. denied, 395 U.S. 938 (1969); *United States* v. *Catino*, 403 F.2d 491, 495 (2d Cir. 1968), cert. denied, 394 U.S. 1003 (1969); *Fernandez* v. *United States*, 329 F.2d 899, 905-906 (9th Cir.), cert. denied, 379 U.S. 832 (1964). See also Rule 14, Fed. R. Crim. P. There was clearly no bad faith here.

Petitioner Walter's claim that Sanders was the subject of much adverse publicity is unsubstantiated and unexplained. In any event, the district court questioned prospective jurors extensively on voir dire about pretrial publicity (see, *e.g.* V Tr. 36-47), and about their ability to give separate treatment to the individual defendants (V Tr. 132).

Nor was joinder improper because of the testimony of Carol Maxey, Sanders' former girlfriend. Whether or not Maxey, on cross-examination by defense counsel, intimated that her false grand jury testimony was instigated by threats from Sanders, this did not prejudice Walter and is no ground for a severance. Further, she did not testify to hearsay statements by Sanders concerning Walter; rather she testified to conversations *between* Walter and Sanders concerning the operation of their adult bookstore business (IX Tr. 23, 26-33, 39). That testimony was

admissible in evidence against both. See Fed. R. Evid. 801(d)(2)(A) and (E). The denial of a severance thus did not violate the rule of *Bruton* v. *United States*, *supra*.

Walter's final two grounds for severance both involve the failure of co-defendant Michael Grassi to testify. Prior to the trial of petitioners, Grassi pleaded guilty to one count of the indictment under an agreement in which he promised to appear as a witness for the government. At trial, on the advice of his present attorney, Grassi refused to testify on behalf of the government for the reason that he intended to invoke the attorney-client privilege regarding admissions he had made to his former attorney, Glen Zell, who represented petitioner Sanders at trial (VIII Tr. 10-12). After the government rested, counsel for petitioner Walter seized upon Grassi's silence and claimed that he desired to call Grassi as a witness for the purpose of showing that Walter had not viewed the "David's Boys" films. Walter's attorney maintained that he could call Grassi to testify only if granted a severance so that Grassi would not be subjected to cross-examination by attorney Zell (IX Tr. 112-121).

The court's denial of this tardy severance motion (IX Tr. 121-122) was in all respects proper. See *United States* v. *Caldwell*, 543 F.2d 1333, 1359 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976). Walter made no credible showing that Grassi would testify in his behalf at a separate trial (see IX Tr. 115). Indeed, Grassi's guilty plea was thereafter



withdrawn and he was tried on all counts of the indictment. Therefore, it is likely that he would have invoked the Fifth Amendment privilege against self-incrimination as well as the attorney-client privilege if called to testify for Walter at a separate trial. Finally, Grassi's testimony would not have been exculpatory. As we have shown (see pages 57-61, *supra*), Walter's conviction rests on sufficient evidence whether or not he viewed the films. Further, considering the incriminating nature of Grassi's suppression hearing testimony, it is unlikely that Grassi could have helped Walter had he testified at trial. Accordingly, the district court's denial of the severance motion did not amount to an abuse of judicial discretion. See *United States* v. *Becker*, 585 F.2d 703, 706 (4th Cir. 1978); *United States* v. *Gay*, 567 F.2d 916 (9th Cir.), cert. denied, 435 U.S. 999 (1978); *United States* v. *Rice*, 550 F.2d 1364 (5th Cir.), cert. denied, 434 U.S. 954 (1977); *United States* v. *Larios-Montes*, 500 F.2d 941 (9th Cir. 1974), cert. denied, 422 U.S. 1057 (1975); *United States* v. *Thomas*, 453 F.2d 141 (9th Cir. 1971), cert. denied, 405 U.S. 1069 (1972).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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79

148